No. 17-571

In The Supreme Court of the United States

FOURTH ESTATE PUBLIC BENEFIT CORPORATION,

Petitioner,

v.

WALL-STREET.COM, LLC, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AUTHORS AND EDUCATORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 3

INTRODUCTION 4

ARGUMENT 8

I. Historically, the Copyright Office Register and the Registration Process Has Upheld Copyright Quality 8

II. Congress Intended the Term "Registration" to Mean a Final Action by the Copyright Office, Not a Mere Application 14

A. The Plain Meaning of the Word "Registration" in Section 411(a) of the Copyright Act Means an Action Taken by the Copyright Office Because to Interpret Otherwise Does Not Make Common Sense 14

B. Legislative History Supports Registration as Meaning a Final Decision by the Copyright Office 19

III. The Term "Registration" Should Mean a Final Action by the Copyright Office Because the Courts, Parties to Litigation, and the General Public Benefit from a Screening Process that Supports Copyright Quality 24

TABLE OF CONTENTS – Continued

Page

A. Courts benefit from the screening process before copyright litigation because they can look to the expertise of the Copyright Office 24

B. Actual and potential defendants benefit from a registration approach that guards against unfounded and spurious claims 27

C. Creators and educators also benefit from the registration approach because a screening process provides clarity to those seeking to safeguard their rights 30

D. The general public benefits from institutions that support copyright quality 32

CONCLUSION 33

TABLE OF AUTHORITIES

Page

CASES

Brown v. Gardner, 513 U.S. 115 (1994) 16

Combat Zone, Inc. v. Does 1-1037, No. 3:10-cv-0090 (N.D.W. Va. Jan. 3, 2011) 29

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Page

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U.S. Const. art. I, § 8, cl. 8 3

STATUTES AND REGULATIONS

8 Anne, c. 2 (1710) 9

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17 U.S.C. § 53 (1909) 11

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Va. Code Ann. § 46.2-600 16

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17 U.S.C. § 410(a) 16

17 U.S.C. § 410(b) 16

17 U.S.C. § 410(c) 7, 31

17 U.S.C. § 410(d) 17, 18, 19

17 U.S.C. § 411 ..... 19, 21

TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

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Page

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INTEREST OF *AMICI CURIAE*[1]

The undersigned authors, educators, and other creators respectfully submit this brief as *amici curiae* in support of Respondents Wallstreet.com, et al. pursuant to Rule 37 of the Rules of this Court. *Amici* urge this Court to affirm the judgment of the U.S. Court of Appeals for the Eleventh Circuit and its definition of "registration" in Section 411(a) of the Copyright Act as meaning a final decision on an application for registration filed with the Copyright Office, after an expert review to determine the copyrightability of the work, rather than the mere filing of the application.

The *amici* are: Steve Anderson, Professor of Digital Media at UCLA; Patricia Aufderheide, Professor at the School of Communication at American University; Nancy Breslin, a fine art photographer and teacher in Washington, D.C.; Peter Decherney, Professor of Cinema & Media Studies and English at the University of Pennsylvania; Melissa Dunphy, an award-winning composer specializing in political and theatrical music; Bob Hercules, a Peabody Award-winning filmmaker whose work has been seen widely on PBS, BBC, the Discovery Channel, and elsewhere; Senna Hubbs, a playwright and fanfiction author; Lewis Hyde, an author and Professor Emeritus of Creative Writing at

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici curiae* or its counsel, has made a monetary contribution to its preparation or submission. The parties have granted blanket consent for the filing of *amici curiae* briefs.

Kenyon College; Kelly Richmond Pope, a documentary filmmaker; Gordon Quinn, the Artistic Director of Kartemquin Films, whose award-winning documentary filmmaking career spans over 50 years; Aram Sinnreich, Associate Professor at the School of Communication at American University; and Rebecca Tushnet, the Frank Stanton Professor of First Amendment Law at Harvard Law School.

Amici are individuals whose livelihood and means of self-expression are dependent on consistent and fair copyright protection. As creators covering a diverse swath of artistic and educational disciplines, *amici* interact with potentially protected material routinely. To reach their audience of viewers, readers, students, and others, the *amici* depend on clarity and transparency in the law. *Amici* require protection for the new copyrightable works they produce, but they also depend in their daily practice on the reasonable availability of pre-existing works as source material. Thus, they depend on the maintenance of what might be called "copyright quality," elements of which include a fair, clear, and consistent boundary between copyrightable and non-copyrightable material and the regular application of that demarcation in particular cases, as well as the availability of public records relating to copyright ownership. In this case, *amici's* main concern is to ensure that the Copyright Office will continue, as Congress intended, to serve as an objective and timely source of expertise on questions of ownership and copyrightability, as this benefits courts, rights holders, users, and the general public.

The "registration approach," requiring domestic copyright claimants to participate in a thorough review by the Copyright Office before commencing infringement litigation in federal court, will help maintain robust and expert oversight of copyright quality, which in turn helps fulfill the constitutional mandate "[t]o promote the Progress of Science and useful Arts." U.S. Const. art. I, § 8, cl. 8. Methodical copyright examination in advance of litigation benefits *amici* by providing useful guidance to courts grappling with difficult copyright questions and serves as an important check (or "speed bump") to discourage unfounded or spurious claims – both functions on which *amici* rely in their capacity as potential copyright defendants. In addition, *amici* also rely on the registration process and the institutional expertise that has developed for guidance about the true nature and extent of their own rights as creators. Moreover, as members of the general public, *amici* depend on the guidance provided by the registration process to distinguish protected content from material in the public domain. By relegating the examination process to a subsidiary position, the so-called "application approach" favored by the Petitioner would put all these interests at risk.

SUMMARY OF THE ARGUMENT

The plain meaning of Section 411(a) of the Copyright Act, its legislative history, and the history of the registration process, as well as both contemporary

Copyright Office registration practices and fundamental underlying policies, necessitate the registration approach. This approach not only enables the Copyright Office to provide timely institutional expertise through consistent and rigorous review of all individual applications for registration, but also through the publication of comprehensive guidance documents. The registration approach promotes effective and efficient judicial decision making by assuring prelitigation review of whether individual works conform to standards of copyrightability; likewise, it supports creators in meeting those standards. It also provides actual or potential defendants with a means for understanding the credibility of claims made against them and functions as a screening mechanism that safeguards against the proliferation of unfounded assertions of copyright.

INTRODUCTION

Many factors in the U.S. copyright regime contribute to copyright quality, including the thorough examination of applications as part of the copyright registration process. The registration process helps assure that the standards of originality and subject-matter eligibility are met with respect to specific works, and that those standards are well articulated and widely understood. After a creator submits an application, an examiner (or "registration specialist") with relevant subject-matter expertise is assigned to the application who then performs a rigorous review of

that application. *See* U.S. Copyright Office, Compendium of U.S. Copyright Office Practices § 206 (3d ed. 2017) (hereinafter Compendium III). The same examiner handles all claims relevant to the application, ensuring familiarity with the needs of that creator. *See Copyright Office Operations, Accomplishments, and Challenges: Hearing Before the Subcomm. on Courts, and Intellectual Property of the H. Comm. on the Judiciary*, 105th Cong. (1998) (Statement of Marybeth Peters, The Register of Copyrights). The registration screening process involves expert scrutiny of applications to assure they meet prevailing standards relating to copyrightable subject-matter and originality, as well as information regarding ownership. *See* Compendium III §§ 206, 602.2. To that end, the Copyright Office has developed a 1,200-plus page manual, the Compendium III, that guides expert examiners. The Compendium III details specific standards to determine what is copyrightable and provides an outline of the examination process. The Compendium III is the result of the effort to maintain and refine standards of copyright quality that has been ongoing since the first edition was published in 1967.

The Copyright Office has recently emphasized the importance of examination, as reflected in its fiscal year 2019 budget request for additional funding to hire examiners, "much-needed registration specialists," and to "train[] [them] in complex copyright claim[] examination." *Fiscal 2019 Budget Request of the United States Copyright Office: Hearing Before the Subcomm. on Leg. Branch Appropriations of the H. Comm. on*

Appropriations, 115th Cong. 5 (2018) (Statement of Karyn Temple, Acting Register, United States Copyright Office); *see also* Energy and Water, Legislative Branch, and Military Construction and Veterans Affairs Appropriations Act of 2019, Pub. L. No. 115-244, § 135 (2018). Expert trained examiners are essential because copyright examination is not a mechanical or ministerial process. When issues arise, copyright examiners correspond with applicants by phone, mail, or e-mail, sometimes for several rounds, in an attempt to resolve deficient aspects of applications, which may include limiting claims relating to a work's copyrightable elements. Approximately 30 percent of all applications lead to such correspondence. *See Registration Processing Times*, U.S. Copyright Office, https://www.copyright.gov/registration/docs/processing-times-faqs.pdf (last visited Oct. 5, 2018). Since many applications are noncontroversial, the effective rate of correspondence in difficult cases is necessarily higher. For instance, in the digital age, examiners frequently work with creators to revise applications to comply with the law of copyrightability in areas such as online databases, websites, and sample-based art and music.

After the review process, when an application is granted registration, a certificate of registration is then issued to the applicant and added to the Copyright Office's online database, which is easily accessible to the public via its website. The public can look to the online database to confirm validity and ownership of a copyright. The end result of the registration review, as confirmed in the certificate, can then be used

as *prima facie* evidence of copyrightability during litigation. *See* 17 U.S.C. § 410(c) (2018).

If after review an application has been denied registration, written notice with an explanation as to why the application was rejected and how to appeal the decision is sent to the applicant. Since 2016, all of the final determinations on second appeal by the Copyright Office's Review Board regarding decisions to refuse copyright registrations are publicly available online. *See Review Board Letters Online*, U.S. Copyright Office, https://www.copyright.gov/rulings-filings/review-board/ (last visited Oct. 12, 2018). Though there is currently no database of every communication between applicants and the Copyright Office, "the vast quantity" of "official correspondence" with applicants, as well as other registration records, are generally available for public inspection on request and discoverable in litigation as part of the public record. *See* 37 C.F.R. § 201.2 (2018); *see also Freedom of Information Act (FOIA) Records*, U.S. Copyright Office, https://www.copyright.gov/foia/ (last visited Oct. 9, 2018).

Documentation relating to registration provides an obvious general public benefit. The value of such information in connection with contemplated or actual legal proceedings, however, depends entirely on when the Copyright Office's expert review is available. By ensuring that the examination process is completed before any lawsuit is commenced, the registration approach promotes both sound jurisprudence and equity among litigants.

The usefulness of a pre-litigation examination process to promote copyright quality is exemplified in the present case, where the Petitioner had attempted to register a collection of materials. Although its application ultimately was rejected because the database was found to lack original selection, coordination, or arrangement, a lawsuit was already underway, proceeding without the benefit of the Copyright Office's expertise. In this case, the lawsuit now has continued for years; whereas, it might have been resolved more quickly under the registration approach.

Registration has been improved, refined, and streamlined over the modern history of U.S. copyright law; as a result, both the application of registration standards to specific works, and general knowledge about those standards, have been enhanced. Only the registration approach supports the mission of the Copyright Office to promote copyright quality by applying clear and consistent standards to disputable questions of ownership and copyrightability in advance of litigation.

ARGUMENT

I. Historically, the Copyright Office Register and the Registration Process Has Upheld Copyright Quality.

Over almost 125 years, the Copyright Office has played an important role in promoting copyright quality by establishing a registration process based on a

comprehensive examination of all claims. In fact, since its very inception, some form of registration in service of copyright quality has been a feature of copyright jurisprudence. In Great Britain, the 1710 Statute of Anne established registration as a prerequisite for the special remedies afforded to copyright owners. *See* 8 Anne, c. 2 (1710). The goal was to assure a public record of copyright ownership. *See* 5 William F. Patry, *Patry on Copyright* § 17:64:10 (2018).

Likewise, the Copyright Act of 1790 required would-be beneficiaries of protection to register "a printed copy of the title of the work, prior to publication, in the clerk's office of the [author's local federal] district court," pay a fee, publish a public notice in a newspaper, and deposit "a copy of the work, within 6 months of publication, [directly] to the Secretary of State," in Washington, D.C. *See* Act of May 31, 1790, ch. 15, § 3, 1 Stat. 124 (1790 Act); *see also* Benjamin Kaplan, The Registration of Copyright, in S. Comm. on the Judiciary Subcomm. on Patents, Trademarks, and Copyrights, 86th Cong., Copyright Law Revision 9 (Study No. 17) (Comm. Print 1960) (hereinafter Kaplan) ("Section 3 stated that 'no person shall be entitled to the benefit of this act' unless he registered."). While the Copyright Act itself continued to evolve from 1831 to 1867, some form of a registration process remained consistent. *See* Kaplan at 11.

By 1870, the need for a centralized federal copyright registration system had become apparent to Ainsworth Spofford, the Librarian of Congress at the time. *See* John Y. Cole, *Ainsworth Spofford &*

Copyright Law of 1870, 6 J. Libr. Hist. 34, 34 (1971) (hereinafter Cole). Registration was established as a condition precedent (along with notice placed on printed copies) to the enjoyment of federal copyright protection. *See* Kaplan at 13-14. In an effort to improve the registration process, Spofford lobbied Congress to centralize federal copyright registration under the Library of Congress. *See* Cole at 34 (quoting a letter Spofford sent to Representative Thomas A. Jenkins, "Permit me to bring your attention to some leading reasons why transfer of the entire copyright business to the Library of Congress would promote public interest."). Spofford ultimately succeeded and became the first *de facto* Register responsible for upholding copyright quality and administering copyright registrations. *See id.*

Although Spofford is perhaps most known for his interest in expanding the Library's collection through registration-related deposits, he also introduced the qualitative dimension of copyright examination. Under Spofford, the newly centralized copyright examination and registration system was informal, but Spofford signed each certificate of registration by hand, and there are records of rejected and cured applications during Spofford's tenure. *See* Judith Nierman, *Certificate from 1897 Has Antique Charm*, Copyright Lore 16 (Nov. 2007), https://www.copyright.gov/history/lore/pdfs/200711%20CLore_November2007.pdf. Spofford, who felt that issuing copyright registrations required his review and that this time commitment

pulled him away from his duties as the Librarian, asked Congress to establish the Copyright Office as a separate entity within the Library of Congress. *See* William F. Patry, *Copyright Law and Practice* 51, n. 166, 52 (1994). When the new Copyright Office was established to handle registration, Spofford passed the torch, nominating Thorvald Solberg as the first official Register of Copyrights. *See id.* at 52.

Solberg, as Register, was at the head of the movement to make a general revision of U.S. copyright law and his efforts led to the passage of the Copyright Act of 1909. *See* Abe Goldman, The History of U.S.A. Copyright Law Revision From 1901 to 1954, in S. Comm. on the Judiciary Subcomm. on Patents, Trademarks, and Copyrights, 86th Cong., Copyright Law Revision 1 (Study No. 1) (Comm. Print 1960). The 1909 Copyright Act statutorily put in place the existing registration requirements necessary before bringing suit, recognizing the importance of a pre-litigation copyright review. *See* Kaplan at 15-21. Moreover, the 1909 Act codified the Register of Copyright's authority to "make rules and regulations for the registration of claims to copyright," allowing the Register to further improve the registration process and establish a rigorous examination review. *See* 17 U.S.C. § 53 (1909).

As part of the groundwork for another projected general revision of U.S. copyright law, in 1958 Professor Benjamin Kaplan was commissioned to conduct a study detailing the registration review process. His findings reflect the evolution of that process and its function under the 1909 Act: "When applications are

received in the Copyright Office, the Examining Division scrutinizes them . . . check[ing] for adequacy of the notice of copy-right; agreement in dates, names, etc., between the application and the deposited copies; propriety of the 'class' in which copyright is claimed; evident copyrightability of the work, and some other matters." Kaplan at 35-36. Further, he emphasized its importance stating, "The check carried out by the Examining Division is a means of enforcing both formal and substantive requirements including . . . copyrightability. . . . As a practical matter this check is perhaps the chief official instrument of law enforcement." Kaplan at 41.

Additionally, Kaplan noted that the registration process is a means of utilizing the expertise of the Copyright Office because "the examination of submitted papers and deposits carried on in the Copyright Office helps to secure a trustworthy body of information," which benefits courts and parties to litigation. *See* Kaplan at 42. The value attached to the registration process was further documented in a 1959 commissioned study by Caruthers Berger, who noted the detrimental effects of not having a thorough registration process: "Further consequences also seem evident: the registration records would be cluttered with unfounded claims; registration records and certificates would be unreliable and would lose much of their probative value for copyright claimants, for other persons dealing with them, and for the courts; and many unfounded claims would probably become the source of litigation." Caruthers Berger, Authority of the Register

of Copyrights to Reject Applications for Registration, in S. Comm. on the Judiciary Subcomm. on Patents, Trademarks, and Copyrights, 86th Cong., Copyright Law Revision 95 (Study No. 18) (Comm. Print 1960) (hereinafter Berger). Further, Berger affirmed that refusals of registration have a variety of useful functions. *See id.* (noting that courts give weight to the Copyright Office's interpretation of the law, and that a refusal can benefit the public and parties by "serv[ing] to inform applicants and the public of the scope of the copyright law.").

Against this backdrop, the 1976 Copyright Act provided that "registration must be made before a suit for copyright infringement is instituted." 17 U.S.C. § 411(a) (2018). As will be discussed below, this provision clearly recognizes that a pre-screening allows the Copyright Office to exercise its expertise on issues of registrability before litigation commences. And in 1984, with the new Copyright Act in place, the Copyright Office published a refined and improved Compendium setting forth in greater detail the standards and procedures designed to ensure a comprehensive copyright quality review process. *See* U.S. Copyright Office, Compendium of U.S. Copyright Office Practices § 108 (2d ed. 1998).

As displayed in the institutional history above, copyright registration has long played an essential role in promoting and upholding copyright quality. It evolved from a system for title recordation into one that also served to promote the central goals of the copyright system. The registration approach respects

this historical development by ensuring that review occurs before litigation, when it is of greatest utility to courts, parties, and the general public. In fact, the Copyright Office itself defines "registration" as an expert review process, not a mere unilateral action, which involves "examining the claim, and if the claim is approved, . . . numbering the claim, *issuing* a certificate of registration, and creating a public record." Compendium III, Glossary, 14 (emphasis added).

II. Congress Intended the Term "Registration" to Mean a Final Action by the Copyright Office, Not a Mere Application.

A. The Plain Meaning of the Word "Registration" in Section 411(a) of the Copyright Act Means an Action Taken by the Copyright Office Because to Interpret Otherwise Does Not Make Common Sense.

In construing a federal statute, one begins with the legislative language as written. In turn, the plain language of Section 411(a) indicates that Congress intended registration to occur only after the Copyright Office has made a decision on an application. When faced with questions of statutory interpretation, this Court prioritizes the plain meaning of the text, giving each word its "ordinary contemporary, [and] common meaning." *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017) (quoting *Walters v. Metropolitan Ed. Enterprises, Inc.*, 519 U.S. 202, 207 (1997)).

The common and ordinary meaning of "register" requires an official *action*, such as "to enter in a public registry" or "to make a record of." *Register*, Black's Law Dictionary (10th ed. 2010); *see also Register*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/register (last visited Oct. 13, 2018) ("[T]o make or secure official entry of in a register."). Copyrights cannot be officially "entered" on the relevant "public registry" until the Copyright Office has reviewed and made a decision on an application.

Common official usage is to the same effect. For example, an individual who owns an aircraft must, before flying, register with the Federal Aviation Administration by submitting an application, acquiring an N-number, paying a fee, and receiving approval from the Administration. *See* 14 C.F.R. § 47.39 (2010) ("An aircraft is registered on the date the Registry determines that the submissions meet the requirements of this part."). Additionally, to be eligible to sit for the California State Bar, an applicant must first register as a law student or attorney with the California State Bar Office of Admissions by submitting an Application of Registration beforehand. *See* Rules of the Cal. St. Bar § 4.16(a)-(b) (West 2018) ("The Application for Registration must be approved," before the applicant can submit other mandated application materials including: a moral character determination and Bar exam application). Likewise, to register one's car with the Virginia Department of Motor Vehicles, an individual must "register with the Department and obtain from the Department the registration card and certificate of

title for the vehicle." Va. Code Ann. § 46.2-600 (1989). Only after review and approval of the applicant's materials is the applicant entitled to registration of the vehicle. *See id.* § 46.2-645 ("[W]hen satisfied that the applicant is entitled to register the vehicle, [the DMV] shall register the vehicle.").

Moreover, to understand the meaning of a statute, individual parts need to be interpreted in relation to the whole because meaning is "a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *see also Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017) (internal citation omitted) ("[A] phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning."). With this in mind, the term "registration" in Section 411(a) must be interpreted to mean a final decision in a multi-step process in order to maintain consistency with Section 410(a), which stipulates that certificates of registration are only issued "*after examination*." 17 U.S.C. § 410(a) (2018) (emphasis added). If an application alone was needed for registration, then there would not be a need for defining "registration" in Section 410(a) as an action after an examination has occurred.

Section 410(b) similarly divides the application and the decision by the Copyright Office into separate occurrences by indicating that once an application is submitted, a refusal may only occur after the intermediary step of the Copyright Office's "determination." *See* 17 U.S.C. § 410(b) (2018). Interpreting "registration"

as the final part of a process of copyright review is further upheld in Section 410(d), which provides, "The effective date of a copyright registration is the day on which an application, deposit, and fee, which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration, have all been received in the Copyright Office." 17 U.S.C. § 410(d) (2018). It would be incongruous to interpret "registration" in Section 411(a) to mean mere filing of an "application" because it would require the conclusion that Congress intended the same term to have different meanings in various parts of the same statutory chapter.

Moreover, this Court has stated "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void[,] or insignificant. . . ." *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)). It is notable, therefore, that the second sentence of Section 411(a) provides, "[w]here the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights." 17 U.S.C. § 411(a) (2018). Not only does this language indicate that application formalities and registration itself are distinct, but this authorization to sue *after refusal* would have no function under the application approach, under which a claimant can file without regard to the outcome of an

application. Likewise, the final sentence of Section 411(a) would be rendered moot in many cases under an application approach. It provides that the Register is able to intervene in litigation after it has completed its examination process and refused registration. That provision, which has its own important role in ensuring copyright quality, would be effectively meaningless in cases where the Copyright Office's decision comes only after litigation has been filed, has advanced, or has even concluded. *See* 17 U.S.C. § 411(a) (2018).

The registration approach also helps to avoid anomalies that could arise in the course of litigation with respect to Sections 410(d) and 412 were the application approach to be preferred. Under Section 410(d), the effective date of registration is backdated to the day when all three parts of an application are received. *See* 17 U.S.C. § 410(d). When the Copyright Office receives an incomplete submission, the effective date of registration is deferred until all materials have been properly submitted. *See id.* Under the application approach, however, a plaintiff may immediately bring suit after submitting even an incomplete application. In this scenario, the effective date of registration could well be later than the commencement – or even the resolution – of the litigation premised upon it. This realistic hypothetical would also create an unworkable structure for awards of attorney's fees and statutory damages, which are premised on effective registration preceding the commencement of infringement. *See* 17 U.S.C. § 412.

B. Legislative History Supports Registration as Meaning a Final Decision by the Copyright Office.

Proponents of the application approach insist that because Section 410(d) provides "[t]he effective date of copyright registration is the day on which an application, deposit, and fee, which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration . . . ," judicial consideration therefore can supplant the Copyright Office's review for all purposes. *See* 17 U.S.C. § 410(d) (2018); *see also* Brief for Petitioner at 38, *Fourth Estate Public Benefit Corp. v. Wall-Street.com* (No. 17-571), 2018 WL 4091715, at *38. The legislative history of Section 410(d) indicates otherwise, demonstrating that the provision was designed *only* to fulfill a specific technical requirement relating to the timing of registration and to take into account "the inevitable time lag between receipt of application and other material and the issuance of the certificate." H.R. Rep. No. 94-1476, at 157 (1976). Courts were not meant to supplant the original function of the Copyright Office's review; instead, Congress recognized that a "federal court might later find that the Copyright Office was wrong in refusing registration" and that the effective date of registration should be assigned by a court of competent jurisdiction as the date that the Office received the application in proper form. *See id.*

Legislative history, however, does support the registration approach. When explaining Section 411 in the 1976 Copyright Act, the House Judiciary Committee

stated that "[t]he first sentence in Section 411(a) restates the present statutory requirement that registration be made before a suit for copyright infringement is instituted." H.R. Rep. No. 94-1476, at 157. Congress's understanding of the "present statutory requirement" in 1976 was informed by the 1965 *Supplementary Register's Report on the General Revision of the U.S. Copyright Law*, which assumes a multi-step process of registration as demonstrated in the statement, "If a claimant has properly applied for registration and been refused, he may maintain an infringement suit." H. Comm. on the Judiciary, 89th Cong., Supplementary Register's Report on the General Revision of the U.S. Copyright Law 11 (Comm. Print 1965); *see also* 5 William F. Patry, *Patry on Copyright* § 17:64.40, n.3 (2018) ("Courts under the 1909 Act appear to have treated the term 'maintained' to be synonymous with 'begun' and not with 'continued.'").

Legislative history also provides evidence that Congress, in the lead-up to the 1976 Act, considered and respected the values of a registration system that upholds copyright quality. The Register of Copyright's 1961 Report to Congress explained how insisting on examination before litigation promotes copyright quality by weeding out "[m]any unfounded claims, usually resulting from a lack of knowledge of the law . . . thus avoiding needless controversy and litigation." H. Comm. on the Judiciary, 87th Cong., Rep. on Copyright Law Revision 72 (Comm. Print 1961) (Report of the Register of Copyrights, General Revision of Copyright Law). Additionally, a registration system was understood to

inform "[a]uthors and other claimants not familiar with the law . . . of the requirements for copyright protection" and to assist "courts in establishing presumptive facts and applying the law." *Id.* at 73, 75.

Subsequently, Congress's continued support for the values embedded in the registration system was demonstrated by its decisions to retain the basic scheme of Section 411's pre-litigation registration requirement in the face of broad-ranging discussions of its possible elimination. First, in 1988, when the United States was attempting to bring itself into compliance with the minimum standards of the Berne Convention (especially Article 5(2)), Congress reconsidered the registration requirement comprehensively and chose to retain Section 411(a) for copyright claimants because "the validity of a copyright claim is a necessary precondition for enforcement of copyright protection under current law." 134 Cong. Rec. S28302 (daily ed. Oct. 5, 1988) (Joint Explanatory Statement on Amendment to S. 1301); *see also* 5 William F. Patry, *Patry on Copyright* § 17:79 (2018). The House Judiciary Committee recognized in its report that keeping a copyright review process before litigation, as established by Section 411(a), is in the "public interest." H.R. Rep. No. 100-609, at 41–42 (1988).

Specifically, "Copyright registration promotes efficient litigation practices, to the benefit of the courts and the public as well as to the parties in the lawsuit. Registration narrows the issues that must be litigated and, since it pertains to proof of ownership, assists the

courts in resolving the underlying copyright dispute. . . ." *Id.* at 41. The Committee also recognized that bad faith actors take advantage of a system where there is no registration process upholding a copyright quality review – a system like the application approach – and argued against the "abolition of section 411(a) [as it] would result in attempts to use the legal system to exert control over materials that Congress intends to be in the public domain." *Id.* at 42. Moreover, "Since the *prima facie* presumption of originality . . . would continue to provide a strong incentive for registration, it would arguably be those claimants who do not have a cognizable claim to copyrightability who would forego the substantial benefits of registration; examples would include utilitarian, industrial[,] and other works that do not meet the existing standards of protection." *Id.*

Congress again considered eliminating the registration requirement of Section 411(a) in the Copyright Reform Act of 1993. *See* H.R. 897, 103rd Cong. §§ 5, 6 (1993). In response, the Librarian of Congress established the Advisory Committee on Copyright Registration and Deposit ("ACCORD") "to advise him concerning aspects of the proposed Copyright Reform Act of 1993." Library of Cong., Rep. on the Advisory Comm. on Registration & Deposit 5 (1993) (Robert Wedgeworth & Barbara Ringer, Co-Chairs) (hereinafter ACCORD). In explaining the logic for keeping the registration requirement, the ACCORD Report mirrors the policy concerns voiced by the House Judiciary Committee in 1988. For example, the ACCORD noted

that Section 411(a) "provides a mechanism by which copyright claims involved in litigation are first exposed to specialized, expert scrutiny [of the Copyright Office], aiding claimants and the courts by clarifying the information on certificates and screening out unfounded claims to copyright." *Id.* at 16. In addition, the Report noted that Congress expressly preferred the "retention of the requirement as helpful to the courts: the better the Copyright Office records, the better the decisions will be." *Id.* at 16. Following the communication of this report to Congress, the legislative initiative did not proceed.

All this well-documented legislative history is consistent with the evidence of plain meaning and context. Taken together, they indicate that Congress continually upheld the values inherent in the registration process and continually chose not to eliminate a prelitigation screening process that would help prevent unfounded claims from going to trial without the benefit of the Copyright Office's expertise.

III. The Term "Registration" Should Mean a Final Action by the Copyright Office Because the Courts, Parties to Litigation, and the General Public Benefit from a Screening Process that Supports Copyright Quality.

A. Courts benefit from the screening process before copyright litigation because they can look to the expertise of the Copyright Office.

It is well established that when "the question as to copyrightability forms the core of the dispute between the parties, . . . input from the Copyright Office – the governmental agency that possesses special expertise in determining the bounds of copyright protection – [can] be of great value (particularly to a judge lacking previous exposure to higher copyright doctrine)." 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 7.16[B][3][b][vi] (2018). Under the registration approach, whether the Copyright Office has granted or rejected an application for registration, the results of the Copyright Office's expertise are available from the outset of any copyright litigation, providing guidance for sound court decisions, and potentially helping to improve judicial inefficiency. This Court emphasized the importance of the registration process to courts as an expression of expertise when it stated, "The registration mechanism, we further note, reduces the need for extrinsic evidence . . . although registration is 'permissive,' both the certificate and the original work must be on file with the Copyright Office before a copyright owner can sue for infringement." *Petrella v.*

Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962, 1977 (2014).

Decisions from courts regarding copyrightability disputes rely upon the Copyright Office's expertise resulting from its registration pre-litigation screening process. *See, e.g., Garcia v. Google, Inc.*, 786 F.3d 733, 741-42 (9th Cir. 2015) (*en banc*) ("The Copyright Office's well-reasoned position 'reflects a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'"); *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 480 (6th Cir. 2015), *aff'd*, 137 S. Ct. 1002 (2017) ("[T]he Copyright Office has grounded its decisions to register . . . in the text of the statute using sound legal reasoning. . . . [T]he Copyright Office's expertise in identifying and thinking about the difference between art and function surpasses ours."); *Inhale, Inc. v. Starbuzz Tobacco, Inc.*, 755 F.3d 1038, 1041 (9th Cir. 2014) (holding that when interpreting the Copyright Act, the court defers to the Copyright Office's interpretations in the appropriate circumstances); *Esquire, Inc. v. Ringer*, 591 F.2d 796, 801 (D.C. Cir. 1978) ("[T]he boundaries between copyrightable 'works of art' and non-copyrightable industrial designs . . . is clearly a matter in which the Register has considerable expertise.").

Additionally, courts have specifically recognized both the consistency of the Copyright Office's expertise, *Varsity Brands, Inc.*, 799 F.3d at 480 ("[T]he Copyright Office consistently applied the same interpretation of separability to Varsity's numerous designs."), and its persuasiveness. *See Inhale, Inc.*, 755

F.3d at 1042 ("Because the Copyright Office's reasoning is persuasive, [this court] adopt[s] it for this case."); *see also Varsity Brands, Inc.*, 799 F.3d at 480 ("[D]istrict court erred by failing to give greater deference to the Copyright Office's registration determinations.").

Under an application approach, courts would often be denied the benefit of the Copyright Office's expertise. They would operate less effectively and efficiently since unfounded claims would move forward without the benefit of a pre-litigation copyright quality screening review. An example of drawbacks associated with the application approach is provided by the recent case of *Garcia v. Google, Inc.* in which the plaintiff alleged copyright infringement because YouTube had hosted a video whose director had transformed her acting performance into "a blasphemous video proclamation against the Prophet Mohammed." 786 F.3d at 736. Finally, after years of litigation, including remands and a rehearing *en banc*, the Ninth Circuit affirmed that a performance in an audiovisual work was uncopyrightable in isolation. *See id.* at 737 ("In light of . . . the Copyright Office's rejection of Garcia's application for a copyright in her brief performance, we conclude that the district court did not abuse its discretion in denying Garcia's request for the preliminary injunction."), *reversing Garcia v. Google, Inc.*, 766 F.3d 929 (9th Cir. 2014) (amending and superseding *Garcia v. Google, Inc.*, 743 F.3d 1258 (9th Cir. 2014), which affirmed *Garcia v. Nakoula*, 2012 WL 12878355, at *1 (C.D. Cal. Nov. 30, 2012)). The court after years of litigation supported the initial decision of the lower court and held that

"[b]ecause neither the Copyright Act nor the Copyright Office's interpretation supports Garcia's [copyright] claim, this is a hurdle she cannot clear." *Garcia v. Google, Inc.*, 786 F.3d at 744.

If the courts of the Ninth Circuit had followed the registration approach rather than the application approach, the Copyright Office's well-reasoned denial of Garcia's registration could have guided the litigation from the outset of the case, or even possibly prevented suit altogether. Similarly, in the case at hand, had the court been able to rely upon the copyright office's expert determination that Fourth Estate's copyrighted materials at issue were part of a compilation of materials and were not worthy of copyright protection, it is possible that this case may never have been brought or would have easily been dismissed. *Garcia* and the present case demonstrate how appropriate reliance on the Copyright Office's system of review for copyright quality can safeguard judicial resources and promote just outcomes.

B. Actual and potential defendants benefit from a registration approach that guards against unfounded and spurious claims.

A cease-and-desist letter or other threat of legal action may be distressing to some, but this is especially so for copyright claims against creators and educators without formal legal training or ample resources. Few members of creative communities are copyright

experts. Too often, when faced with facially plausible threats (perhaps on a lawyer's letterhead), they may forgo their right to be heard by a court on the understandable assumption that the copyright being asserted is a valid one. The resulting chilling effect can result in dubious "settlement" fees being paid, and in valuable works being withdrawn from public circulation. In one case, an entity fraudulently claimed to own the rights to an image and ceased to make legal threats only when presented with clear evidence that the creator was acting within her rights. Were the Court to uphold the registration approach, a creator would always be in a position to demand a certificate of copyright registration in defense of a threat of litigation and could further evaluate the situation in light of the response.

Amici who are professors and scholars may encounter special difficulties because they work within universities or depend on publishers to reach intended audiences. For them, the risk-aversion of institutional legal decision-makers can lead to valuable academic works being suppressed or modified. According to *amicus* Professor Peter Decherney, a leader in the use of new technology in higher education, "it is already difficult enough for a conscientious educator to navigate the requirements of copyright in developing online course materials; it would be immeasurably more difficult to operate under a Damoclean sword of instant litigation based on unverified claims" – *i.e.*, the application approach. *Amicus* Professor Steve Anderson reiterated that in his experience as an author and

journal editor, "uncertainty related to copyright leads to especially pernicious patterns of self-censorship, in which fearful or ill-informed scholars, creators[,] or presses will avoid potentially important subjects or lines of inquiry rather than risk even the remotest possibility of a legal challenge."

Additionally, the application approach would allow malicious parties to continue to prey on creators with threats of legal action without owning a valid copyright. Requiring expert pre-litigation scrutiny by the Copyright Office will help prevent meritless threats from entities purporting to be legitimate rights holders. Adherence to the registration approach, by contrast, will help check this phenomenon of "copyright trolling," in which a business not engaged in producing creative works nevertheless acquires and asserts interests in purported copyrights for the primary purpose of securing settlements. Collectively, these bad actors have brought litigation against hundreds or thousands of individuals, demanding monetary damages for claims that may reflect little in the way of copyright quality. *See Third World Media, LLC v. Does 1-1568*, No. C 10–04470 LB, 2011 WL 4344160 (N.D. Cal. Sept. 15, 2011); *see also Combat Zone, Inc. v. Does 1-1037*, No. 3:10-cv-0090 (N.D.W. Va. Jan. 3, 2011). In 2013, multi-defendant *John Doe* cases were the majority of the copyright cases filed in 19 of the 92 federal districts. *See* Matthew Sag, *Copyright Trolling, An Empirical Study*, 100 Iowa L. Rev. 1105, 1108 (2015). One such entity was ordered to pay $116,718 for bringing suit without standing; in another case, the same

company was ordered to pay over $225,000 in legal fees and at least one $5,000 sanction for misleading the court. *See Righthaven, LLC v. DiBiase*, No. 2:10-cv-01343, 2011 WL 5101938, at *12 (D. Nev. Oct. 26, 2011); *see also Righthaven, LLC v. Democratic Underground*, 791 F. Supp. 2d 968, 973 (D. Nev. 2011).

There are other copyright disputes, however, where unfounded claims are not contested, and therefore, go unchecked. Interpreting Section 411(a) to require a final decision from the Copyright Office creates a significant speed bump for such spurious or misleading claims. The registration approach promotes fairness between the parties by reducing structural advantages that operate to the copyright trolls' advantage. More generally, under the registration approach favored by *amici*, the presence or absence of copyright registrations (as well as the details of any such registrations) would help inform the choices of those facing threats of a potential infringement litigation, whether from good-faith (but perhaps misinformed) claimants or from copyright trolls.

C. Creators and educators also benefit from the registration approach because a screening process provides clarity to those seeking to safeguard their rights.

The registration approach also benefits creators and educators, such as the *amici*, when seeking copyright protection of their works. Throughout the registration process, in ways that range from general

guidance to individualized correspondence, the Copyright Office assists applicants to clarify and improve their claims and develop more accurate and effective registrations. Individual creators' *quid pro quo* for participating in mandatory pre-litigation review is that, by the time a certificate of registration has been issued, they will have valuable information about the scope and strength of their rights. For example, a musical creator who makes use of digital samples from other recordings may be required in the course of the registration process to confine the description of an original composition to his or her own individual contributions. Likewise, the editor of a new scholarly edition may be asked to restrict his or her claim to the introduction, notes, and other original aspects of the scholarly apparatus, as distinct from the underlying public domain text. Such limitations can enhance the quality of the application where issues of both copyrightability and ownership are concerned. This kind of expert guidance ultimately enhances the copyright owner's likelihood of success in negotiations or litigation with infringers.

In turn, the *prima facie* presumption of validity conferred by a certificate of registration, 17 U.S.C. § 410(c) (2018), reflects the value that participation in the registration process confers on rights holders. The statute thus shifts the burden of proof to the alleged infringers, forcing them to rebut the Copyright Office's expert opinion. *See S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1085 (9th Cir. 1989). Once the Copyright Office has issued its certificate, a creator with limited

resources may feel more empowered to assert his or her infringement claim in court.

D. The general public benefits from institutions that support copyright quality.

All members of the public, including *amici*, constantly interact with and consume actually or potentially copyrighted works. By the same token, this Court consistently has recognized the importance of assuring fairness in public access to uncopyrightable content to best "encourage others to build freely upon the ideas and information conveyed by a work" and to uphold "the essence of copyright." *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 349 (1991). *Feist*, in which this Court unanimously expressed a strong constitutional policy favoring access to public domain material, was a dispute over the appropriate protection of an informational compilation – as is the present case. But, copyright quality matters for all kinds of works and to everyone who wishes to exercise their rights as citizens while acting in accordance with the law.

This Court has recognized that institutional support for copyright quality makes an important contribution to achieving the aims of a balanced copyright system. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1991) ("Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the law's boundaries be demarcated as clearly as

possible."). The Copyright Office's expertise serves this public interest in copyright quality by informing the courts when they decide issues of copyrightability and encouraging the creation of guidance documents that mark the metes and bounds of copyright protection more clearly before litigation.

CONCLUSION

The registration approach allows the Copyright Office to provide Congress, the courts, parties, and the general public a pre-litigation screening process to promote copyright quality and eliminate uncertainty for all creators and educators who seek federal copyright protection. Therefore, this Court should affirm the Eleventh Circuit holding that registration occurs after a final decision by the Copyright Office.

Respectfully submitted,

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